SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 95

CATHERINE LLEWELLYN VAN WART, BY ROY M. VAN WART, NATURAL TUTOR, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Fifth Circuit	A	1
Caption (omitted in printing)	A	
Proceedings before United States Board of Tax Appeals	2	1
Docket entries	2	1
Petition	3	2
Exhibit "A"—Notice of deficiency	11	7
Answer	16	10
Stipulation of facts	19	13
Memorandum opinion, Sternhagen, M	21	14
Judgment	22	15
Petition for review and assignments of error	23	16
Notice of filing petition for review	29	19
Præcipe for record	30	20
Clerk's certificate (omitted in printing)	32	
Minute entry of argument and submission	33	23
Opinion, Bryan, J	34	23
Judgment	38	26
Clerk's certificate	39	26
Order allowing certiorari	40	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1934.

—5490-C.

[fols. ½ & a–1] [Caption omitted]

[fol. 2]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 43967

MISS CATHERINE LLEWELLYN VAN WART, by Roy M. Van Wart, Natural Tutor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Thos. A. Dubourg, Esq., Frederick R. Gibbs, Esq.

For Comm'r.: J. E. Marshall, Esq.

DOCKET ENTRIES

1929

Apr. 29. Petition received and filed. Taxpayer notified. (Fee paid.)

Apr. 30. Copy of petition served on General Counsel.

Jun. 14. Answer filed by General Counsel.

Jun. 17. Copy served on taxpayer. General Calendar.

1931

Jan. 27. Notice of appearance of Frederick R. Gibbs as counsel for taxpayer filed.

Jan. 27. Motion to transfer to the Reserve Calendar filed by taxpayer. 1/28/31 granted to Reserve A.

1932

Jul. 29. Hearing set November 14, 1932.

Nov. 7. Stipulation of facts filed.

Nov. 14. Hearing had before Mr. Sternhagen, Div. 10, called on merits. Submitted—no briefs.

[fol. 3]

Nov. 30. Transcript of hearing Nov. 14, 1932 filed.

Dec. 5. Memorandum opinion rendered, Mr. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

1933
Jan. 6. Consent to settlement filed by taxpayer (void).
Jan. 11. Notice of settlement filed by General Counsel.
Jan. 16. Hearing set Feb. 8, 1933 on settlement.
Jan. 23. Consent to settlement filed by taxpayer.
Jan. 28. Judgment entered, Mr. Sternhagen, Div. 10.
Apr. 19. Petition for review by U. S. Circuit Court of Appeals (5) with assignments of error filed by General Counsel.
Apr. 20. Proof of service filed by General Counsel.
May 2. Præcipe with proof of service thereon filed.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed Apr. 29, 1929

The above-named petitioner hereby petitions for a re determination of the deficiency set forth by the Commis- [fol. 4] sioner of Internal Revenue in his notice of deficiency (symbols IT:AR:B-1-FMA-60D), dated March 6, 1929, and as a basis of her proceeding alleges as follows:

I

The petitioner is an individual, a minor, residing in New Orleans, Louisiana, at 4216 General Taylor Street. Petitioner's father, Roy M. Van Wart, is her natural tutor under the laws of the State of Louisiana, and as such represents her herein.

II

The notice of deficiency (a copy of which is attached hereto marked Exhibit A) was mailed to the petitioner on March 6, 1929.

III

The taxes in controversy are income taxes for the calendar year 1924 in the amount of One Hundred Four Thousand Five Hundred Fifty and 59/100 Dollars ($104,550.59).

IV

The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. Increase of $2,457.32 in "other income from Estate of Jenkins Jones";

2. Inclusion in taxable income of $159,094.16 received during the year 1924 from Estate of Jenkins Jones under a decree of the United States Circuit Court of Appeals for the Fourth Circuit;

3. Increase of $77,556.36 in dividends reported by petitioner;

[fol. 5] 4. Disallowance of $30.23 taxes paid;

5. Disallowance of attorney's fees amounting to $30,000.00; and

6. Disallowance of loss of $767.69 on operation of Orange Grove, Lakeland, Florida.

V

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

1. (a) The petitioner is sole beneficiary of the Trust Estate of Catherine Van Wart, created by the will of Jenkin Jones, deceased, and forming a part of the Estate of Jenkin Jones deceased.

(b) The trustee of the Trust Estate of Catherine Van Wart filed a fiduciary return for the calendar year 1924 showing net income distributable to the petitioner from the said trust estate as follows:

Dividends	$77,556.36
Other Income	2,685.32
Total	$80,241.68

(c) The item "Other Incomes" consisted of the following:

Interest on corporation bonds		$ 228.00
Interest on United States Treasury Certificates		3,255.24
Total		$3,483.24
Less: Taxes paid	$ 30.23	
Loss on operation of Orange Grove at Lakeland, Fla.	767.69	797.92
Net amount of other income		$2,685.32

[fol. 6] (d) The petitioner reported the item of "other income" amounting to $2,685.32 in her return for the year 1924, as follows:

Line 4, Income from fiduciary (Interest on Corporation Bonds)		$ 228.00
Line 8, Interest on U. S. Treasury Certificates	$3,255.24	
Less exempt	75.00	3,180.24
Total		$3,408.24
Line 12, Taxes Paid	$ 30.23	
Line 16, Loss on operation of Orange Grove, Lakeland, Fla.	767.69	797.92
Net amount reported as income from Estate of Jenkin Jones		$2,685.32

(e). The respondent added $2,457.32 to the amount of $228.00 reported on line 4 of the return, so as to bring the income shown on that line to $2,685.32, the amount of "Other Income" reported by fiduciary.

2. (a) The petitioner's grandfather, Jenkin Jones, by a will dated August 24, 1915, and presented for probate December 26, 1916, directed that a portion of his estate be held in trust and the income theerfrom paid over to his daughter, May Llewellyn Van Wart, as promptly as possible after collection, during her life and that at her death, or if his daughter should predecease him, then at his death, such share of the estate should immediately vest in and become the property of his daughter's children or their lineal descendants, with the provision that his executors should hold in trust the shares of any of the children or [fol. 7] lineal descendants of his daughter who were living at the time of her death and were not at that time twenty-one years of age until such child or lineal descendant should have attained the age of twenty-one years, at which time or times, respectively, the share of each and every child or lineal descendant should be paid over to him and become his sole, separate, and absolute property.

(b) The daughter, May Llewellyn Van Wart, survived the testator and thereafter died, leaving as her only issue a daughter, the petitioner herein, who had not attained the

age of twenty-one years. The trustee held the petitioner's share of the estate of Jenkin Jones in trust, under the terms of the will, and interpreted the will as directing him to accumulate the income of said trust instead of distributing it currently to the petitioner.

(c) The petitioner, acting through her father, who had been confirmed as her natural tutor under the laws of the State of Louisiana, brought suit to compel the trustee to distribute the income to her, and on January 11, 1924, the United States Circuit Court of Appeals for the Fourth Circuit rendered a decision (295 Feb. 287) holding that the will did not authorize the trustee to accumulate the income, and that the income of the trust should have been distributed currently to the petitioner.

(d) Thereafter, pursuant to the said decision of the Circuit Court of Appeals, the trustee paid over to the petitioner, during the year 1924, $159,094.16 of income accumulated during years prior to 1924.

(e) The petitioner did not report the amount of $159,094.16 as taxable income for the year 1924.

[fol. 8] (f) The respondent has added the amount of $159,094.16 to petitioner's taxable income for the year 1924.

3. (a) The fiduciary return filed by the Trustee of the Trust Estate of Catherine Llewellyn Van Wart under the will of Jenkin Jones shows the petitioner's share of dividends received by the said estate as $77,556.36. (See item 1 (b) herein.)

(b) The petitioner reported the said $77,556.36 of dividends, this amount being included in the item of $81,805.66, reported on line 7 of petitioner's return for the year 1924.

(c) The respondent has added the amount of $77,556.36 to the dividends reported by the petitioner.

4. (a) The Trust Estate of Catherine Llewellyn Van Wart paid taxes amounting to $30.23 during the year 1924, which were reported as a deduction in the fiduciary return filed by the trustee.

(b) In her income tax return, the petitioner reported the entire gross income collected by the Trust Estate, as explained in item 1 (d) herein, and claimed a deduction for the taxes paid, amounting to $30.23.

(c) The respondent disallowed the deduction.

5. (a) In order to compel the trustees of the Estate of Jenkin Jones to distribute to petitioner the income from said estate to which the petitioner was entitled under her grandfather's will, it was necessary to bring suit against the said trustees, which was done through petitioner's natural Tutor, Roy M. Van Wart, her father.

[fol. 9] (b) In connection with this suit, a fee of $30,000.00 was paid to petitioner's attorneys.

(c) The said fee was a business expense necessarily incurred to obtain possession of petitioner's income accumulated in prior years.

(d) The petitioner deducted such fees as a business expense in her return for the year 1924. The respondent has disallowed the deduction.

6. (a) In the fiduciary return filed by the trustee of the Trust Estate, a loss of $767.69 from operation of Orange Grove, Lakeland, Fla. was reported.

(b) The petitioner, having reported all gross income from the trust estate in her return for the year 1924, as explained in item 1 (d) herein, claimed a deduction on line 16 of her return for the said loss of $767.69 from operation of said Orange Grove.

(c) The respondent has disallowed the deduction of $767.69.

Wherefore, the petitioner prays that this Board may hear the proceeding and disallow the deficiency asserted by the respondent.

Thos. A. Dubourg, 1307 Pere Marquette Bldg., New Orleans, Louisiana, Counsel for Petitioner.

[fol. 10] *Duly sworn to by Roy M. Van Wart. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" TO PETITION

Copy

Treasury Department, Washington

Office of Commissioner of Internal Revenue

March 6, 1929.

Miss Catherine Llewellyn Van Wart, c/o Roy M. Van Wart, Guardian, 727 First National Bank Bldg., San Diego, California.

MADAM: In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1924 discloses a deficiency of $104,550.59, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days [fol. 12] after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully, D. H. Blair, Commissioner, by (S.) C. B. Allen, Deputy Commissioner.

Enclosures: Statement. Form 866. Form 882.

Statement

IT:AR:B-1.
FMA-60D

March 6, 1929.

In re/Mrs. Catherine Llewellyn Van Wart, c/o Roy M. Van Wart, Guardian, 727 First National Bank Bldg., San Diego, California.

Year.	Corrected Tax. Liability	Tax Previously Assessed.	Deficiency.
1924	$107,580.84	$3,030.25	$104,550.59

The report of the Internal Revenue Agent in Charge at San Francisco, California, covering the verification of your income tax return for the year 1924, has been reviewed and approved by this office with the exceptions indicated hereinafter.

[fol. 13] 1924

Net income disclosed by return		$47,119.76
Add:		
1. Other income from Estate of Jenkins Jones	$2,457.32	
2. Income from Estate of Jenkins Jones	159,094.16	
3. Dividends received through Estate of Jenkins Jones	77,556.36	
4. Taxes disallowed	125.23	
5. Attorney fees disallowed	30,000.00	
6. Capital loss sustained by Estate of Jenkins Jones	767.69	270,000.76
		$317,120.52
Deduct:		
7. Liberty Bond interest exempt		137.50
Adjusted net income		$316,983.02
Less:		
Dividends	$159,362.02	
Liberty Bond interest	3,042.74	
Personal exemption	1,000.00	163,404.76
Income subject to normal tax		$153,578.26

Computation of Tax

Normal tax at 2% on $4,000.00		$80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on $145,578.26		8,734.70
Surtax on $316,983.02		98,643.38
Total tax		$107,618.08
[fol. 14] Less:		
Tax paid at source	$17.24	
Earned income credit	20.00	37.24
Tax liability stated on Form 866		$107,580.84
Tax previously assessed		3,030.25
Proposed deficiency		$104,550.59

Explanation of Changes

1. Form 1041 filed by the Estate of Jenkin Jones for the year 1924 discloses other income distributed to you in the amount of $2,685.32. Since you have reported $228.00 from this source, the difference of $2,457.32 has been added to the gross income in accordance with Articles 341 and 342 of Regulations 65, relating to the Revenue Act of 1924.

2. This item represents income of the Estate of Jenkin Jones accumulated to March 14, 1924 and paid to you during the year 1924 in accordance with a court decree. This adjustment is in accordance with Articles 341 and 342 of Regulations 65.

3. Form 1041 filed by the Estate of Jenkin Jones for the year 1924, discloses dividends of $77,556.36 distributed to you which do not appear to have been reported in your return for 1924. This amount has therefore been included in the gross income in accordance with Articles 341 and 342 of Regulations 65.

4. Taxes of $95.00 paid on a new automobile purchased by you are not an allowable deduction from your gross income for the reason that such taxes are assessed against the automobile manufacturer. The amount of these taxes should therefore be added to the cost of the automobile [fol. 15] purchased by you. Taxes of $30.23 have been dis-

allowed for the reason that they were allowed as a deduction with the Estate of Jenkin Jones.

5. This item has been disallowed for the reason that it is held to constitute a charge against the corpus of the Estate of Jenkin Jones.

6. This item represents a loss sustained from the sale of the capital assets of the Estate of Jenkin Jones and is therefore disallowed as a deduction from your gross income in accordance with the provisions of Treasury Decision 3668, reported in Internal Revenue Cumulative Bulletin, IV-1, Page 191.

7. This item represents exempt interest.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1924, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3867 to discuss your case before mailing formal notice of its determination, as provided by Section 274(a) of the Revenue Act of 1926. It is therefore necessary at this time in order to protect the interests of the Government, to issue this formal notice of deficiency.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[fol. 16] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed June 14, 1929

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition herein, admits and denies as follows:

I

Admits the allegations of paragraph I of the petition.

II

Admits the allegations of paragraph II of the petition.

III

Admits the allegations of paragraph III of the petition.

IV

(1) Admits that the Commissioner erred as alleged in subparagraph (1) of paragraph numbered IV of the petition in that he increased petitioner's income by $2,382.32.

[fol. 17] (2) Denies error as alleged in subparagraph (2) of paragraph numbered IV of the petition.

(3) Denies error as alleged in subparagraph (3) of paragraph numbered IV of the petition.

(4) Admits error in disallowing $30.23 as alleged in subparagraph (4) of paragraph numbered IV of the petition.

(5) Denies error as alleged in subparagraph (5) of paragraph numbered IV of the petition.

(6) Denies error as alleged in subparagraph (6) of paragraph numbered IV of the petition.

V

1. (a) As to subparagraph (1)-(a) of paragraph numbered V of the petition the respondent is without knowledge and hence denies the same.

(b-c) Admits subparagraphs (1)-(b) and (1)-(c) of paragraph of the petition numbered V.

(d) As to subparagraph (1)-(d) of paragraph of the petition numbered V the respondent is without knowledge concerning the item of $75.00 alleged as exempt from income, and hence denies that such item represents exempt income, but admits the remaining allegations of said subparagraph.

(e) Admits the allegations of subparagraph (1)-(e) of paragraph of the petition numbered V.

2. (a-b-c) As to subparagraphs (2)-(a), (b) and (c) of [fol. 18] paragraph of the petition numbered V, respondent is without knowledge and hence denies the same.

(d-e-f) Admits the allegations of subparagraphs (2)-(d), (e) and (f) of paragraph of the petition numbered V.

3. (a) Admits the allegations of subparagraph (3)-(a) of paragraph of the petition numbered V.

(b) Denies the allegations of subparagraph (3)-(b) of paragraph of the petition numbered V.

(c) Admits the allegations of subparagraph (3)-(c) of paragraph of the petition numbered V.

4. (a-b-c) Admits the allegations of subparagraphs 4 (a), (b) and (c) of paragraph of the petition numbered V.

5. (a-b-c) Denies subparagraphs 5 (a), (b) and (c) of paragraph of the petition numbered V.

(d) Admits that petitioner deducted said attorney's fee and respondent disallowed said fee, but denies all other allegations of subparagraph 5 (d) of paragraph of the petition numbered V.

6. (a) Admits the allegations of subparagraph 6 (a) of paragraph of the petition numbered V.

(b) Admits that petitioner claimed a deduction of $767.69 from operation of an orange grove on her 1924 return, and denies the remaining allegations of subparagraph 6 (b) of paragraph of the petition numbered V.

[fol. 19] (c) Denies the allegations of subparagraph 6 (c) of paragraph of the petition numbered V.

Denies each and every allegation of fact contained in said petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be affirmed.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: Brooks Fullerton, Special Attorney, Bureau of Internal Revenue.

6/14/29.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Received Nov. 7, 1932. Filed Nov. 7, 1932

It is hereby stipulated and agreed by and between the parties to the above-styled proceeding, by their respective counsel of record, as follows:

[fol. 20] (1) In a suit in equity instituted in the District Court of the United States for the Southern District of West Virginia by Catherine Llewellyn Van Wart, an infant, by her next friend, Roy McLean Van Wart, against James Ellwood Jones and Isaac T. Mann, executors and trustees under the Will of Jenkins Jones, deceased, a decree was entered for defendants. Upon appeal, the Circuit Court of Appeals for the Fourth Circuit reversed the District Court. The facts set forth in the decision of the Circuit Court of Appeals, reported at 295 Fed. 287, are hereby adopted and by reference made a part hereof.

(2) Pursuant to the decision of the Circuit Court of Appeals, the trustees paid over to the guardian all income then accumulated under the trust and thereafter paid over the income from the trust as it accumulated yearly.

(3) The law firm of Reynolds & Reynolds, of Princeton, West Virginia, conducted the litigation in behalf of petitioner, appearing by her next friend, Roy McLean Van Wart; and by authority of the Court, they were paid a fee of $30,000.00 on April 11, 1924 for their services.

(4) In the return filed in behalf of petitioner by Roy McLean Van Wart for the year 1924, the sum of $30,000.00 was set up and claimed as a deduction against gross income on account of the fee paid to Reynolds & Reynolds. Upon audit, the respondent disallowed the deduction.

(5) In the deficiency notice, the respondent added the following items to the net income as disclosed by the return filed in behalf of the petitioner for 1924:

[fol. 21] 1. Other income from Estate of Jones ..... $ 2,457.32

2. Income from Estate of Jenkins Jones	159,094.16
3. Dividends received through Estate of Jenkins Jones	77,556.36
4. Taxes disallowed	125.23
5. Attorney fees disallowed	30,000.00
6. Capital loss sustained by Estate of Jenkins Jones	767.69

(6) It is agreed that respondent erroneously added items 1, 2, 3, 4 and 6 to the net income as disclosed by the return filed in behalf of petitioner for 1924.

(Sgd.) Frederick R. Gibbs, Counsel for Petitioner.
(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for Respondent.
JEM/cal 11/3/32.

BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 43967

CATHERINE LLEWELYN VAN WART, by Roy M. Van Wart, Natural Tutor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Frederick R. Gibbs, Esq., for the petitioner.
John E. Marshall, Esq., for the respondent.

MEMORANDUM OPINION

STERNHAGEN:

The petitioner is a minor, and a beneficiary under the will of Jenkins Jones, deceased. By her guardian, she instituted a proceeding against the executors of said decedent's estate to require an immediate distribution to her of accumulated income. A decision adverse to her in the District Court was reversed by the Circuit Court of Ap- [fol. 22] peals, and the litigation thus ended in her favor. For the services of her attorneys in this litigation, she paid a fee of $30,000 in 1924. In the income tax return filed in her behalf by her guardian, a deduction was taken of this amount, and the respondent, upon audit, disallowed the de-

duction. Several other adjustments by the respondent brought about the determination of a deficiency in petitioner's income tax for 1924 of $104,550.59. The parties have settled all matters in controversy except the deductibility of the item of $30,000, which alone remains for decision.

The petitioner relies upon Commissioner v. Wurts-Dundas, 54 Fed. (2d) 515, affirming 17 B. T. A. 881, as deciding exactly the same question, and respondent admits a substantial similarity. We think the two cases are sufficiently alike to require similar decisions. Therefore, without reconsidering the merits of the argument, the determination of the respondent that the attorney fee of $30,000 is not deductible is reversed.

Judgment will be entered under Rule 50.

Entered Dec. 5, 1932.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 43967

CATHERINE LLEWELYN VAN WART, by Roy M. Van Wart, Natural Tutor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JUDGMENT

Subsequent to the Board's Memorandum Opinion, entered December 5, 1932, the respondent filed a proposed [fol. 23] judgment which the petitioner agrees in writing is in conformity with the said Memorandum Opinion. In accordance therewith, it is

Ordered, adjudged and decided that there is an overpayment of income tax for 1924 of $10.33.

(Signed) John M. Sternhagen, Member. (Seal.)

Entered Jan. 28, 1933.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed April 19, 1933

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes David Burnet, Commissioner of Internal Revenue, by his attorney, Sewall Key, Special Assistant to the Attorney General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and J. E. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

[fol. 24]

I

The petitioner on review (hereinafter referred to as the Commissioner), is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the United States. The respondent on review (hereinafter referred to as the taxpayer), is a minor, residing in New Orleans, Louisiana, and a beneficiary under the Will of Jenkins Jones, deceased. The taxpayer's father, Roy McLean Van Wart, is her natural tutor and guardian under the laws of the State of Louisiana, and was duly qualified and acting in that capacity in the year 1924. Both the taxpayer and her father are citizens and actual residents of the State of Louisiana and the same was true in the calendar year 1924. The Federal individual income tax return of taxpayer for the calendar year 1924, being the taxable year involved herein, was filed on her behalf by her guardian and tutor, pursuant to the statute in such cases made and provided, with the Collector of Internal Revenue for the District of Louisiana, and the office of said Collector is located within the judicial circuit of the United States Circuit Court of Appeals for the Fifth Circuit.

II

The nature of the controversy is as follows, to-wit:

The taxpayer filed a petition with the United States Board of Tax Appeals on April 29, 1929, in pursuance

of the provisions of the Revenue Acts of 1926 and 1928, requesting the redetermination of a deficiency in income and surtaxes for the calendar year 1924, amounting to $104,550.59, as shown by the final notice of deficiency dated March 6, 1929, which was answered by the Commissioner on June 14, 1929.

[fol. 25] The United States Board of Tax Appeals promulgated a memorandum opinion on December 6, 1932, which was adverse to the Commissioner of Internal Revenue on the issue hereinbelow presented. The Board's order for judgment under its decision was entered on January 28, 1933.

The only issue submitted in this petition for review is: Whether the taxpayer is entitled to a deduction under the provisions of Section 214(a)(1) of the Revenue Act of 1924 against gross income of $30,000.00, representing a fee paid to attorneys for conducting litigation to determine if trust income, under the terms of a will, should be distributed or accumulated.

Taxpayer, who is a minor and a beneficiary under the will of Jenkins Jones, deceased, instituted a proceeding by her next friend, Roy McLean Van Wart, against the executors of said decedent's estate to require an immediate distribution to her of accumulated income. A decision adverse to her in the District Court of the United States for the Southern District of West Virginia was reversed by the United States Circuit Court of Appeals for the Fourth Circuit (295 Fed. 287), and the litigation thus ended in her favor. For the services of her attorneys in this litigation, taxpayer paid a fee of $30,000.00 in 1924. In the income tax return for 1924 filed in her behalf by her guardian, a deduction was taken of this amount, and the Commissioner, upon audit, disallowed the deduction. The Board decided the case upon the authority of Commissioner v. Wurts-Dundas, Central Union Trust Co. of New York, Guardian (C. C. A. 2d), 54 F. (2d) 515, affirming the Board of Tax Appeals (17 B. T. A. 881). That case presented a similar question which was decided adversely to the Commissioner by the Board of Tax Appeals [fol. 26] and the Board's decision was affirmed by the Circuit Court of Appeals for the Second Circuit.

Section 219(b) of the Revenue Act of 1924, so far as here material, provides that the fiduciary shall file the

return and that the net income of "the estate or trust" shall be computed in the same manner as that of an individual. By Section 212 of the same Act, the net income of an individual is made the gross income under Section 213 less deductions allowed by Section 214. Section 214(a)(1) of the same Act provides that there shall be allowed to individuals as deductions "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Taxpayer was not engaged in any trade or business. She was a beneficiary under a will. To establish her right to an immediate distribution to her of accumulated income as such beneficiary, she litigated the matter and paid a fee of $30,000.00 to her attorneys.

The issue has not yet been squarely presented in any case before the Supreme Court and has only been presented to one Circuit Court.

III

That the said Commissioner's assignments of error are as follows:

(1) That the Board erred in reversing the determination of the Commissioner that the attorney fee of $30,000.00 paid in 1924 is not deductible.

(2) That the Board erred in failing to hold that the attorney fee of $30,000.00 is not deductible as an ordinary and necessary expense paid during the taxable year 1924 in carrying on a trade or business.

[fol. 27] (3) That the Board erred in holding that the attorney fee of $30,000.00 is a deductible expense under the provisions of Section 214(a)(1) of the Revenue Act of 1924.

(4) That the Board erred in not holding that the attorney fee of $30,000.00 paid in 1924 is not deductible under the provisions of Section 215(a) of the Revenue Act of 1924.

(5) That the Board erred in entering a judgment against the Commissioner showing an overpayment of $10.33 in income tax for the year 1924.

Wherefore, the Commissioner petitions that the decision of the U. S. Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) Sewall Key, Special Assistant to the Attorney General. C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. E. Marshall, Special Attorney, Bureau of Internal Revenue.

[fol. 28] *Duly sworn to by C. M. Charest. Jurat omitted in printing.*

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Received April 20, 1933. Filed April 20, 1933

To Frederick R. Gibbs, Esq., 707 Munsey Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of April, 1933, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United Stafes Circuit Court of Appeals for the Fifth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of April, 1933.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assign-

[fol. 30] ments of errors mentioned therein, is hereby acknowledged this 20th day of April, 1933.

Catherine Llewellyn Van Wart by Roy M. Van Wart, Nat'l Tutor, Respondent on Review.
Frederick R. Gibbs, Attorney for Respondent on Review.

csl 4/19/33.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PRÆCIPE FOR RECORD—Received May 2, 1933. Filed May 2, 1933

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board. [fol. 31] 2. Pleadings before the Board: (a) Petition filed April 29, 1929, including annexed copy of deficiency letter. (b) Answer to petition filed June 14, 1929.

3. Stipulation of Facts filed with Board on November 7, 1932.

4. Memorandum opinion of the Board promulgated and entered December 5, 1932.

5. Order of "Judgment" entered by Board on January 28, 1933.

6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

7. Letter dated March 6, 1929, with statement attached, which was offered in evidence as Petitioner's Exhibit #1

and made a part of the record. For Petitioner's Exhibit No. 1 see 60 day letter attached to petition.

8. This præcipe.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Service of a copy of the within Præcipe is hereby admitted this 2nd day of May, 1933.

Frederick R. Gibbs, Attorney for Respondent on Review.

Cr/csl 4/19/33.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 6990

COMMISSIONER OF INTERNAL REVENUE

versus

CATHERINE LLEWELLYN VAN WART, by ROY M. VAN WART, Natural Tutor

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 27th, 1934

On this day this cause was called, and, after argument by Carlton Fox, Esq., Special Assistant to the Attorney General, for petitioner, and Frederick R. Gibbs, Esq., for respondent, was submitted to the Court.

[fol. 34] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6990

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

versus

CATHERINE LLEWELLYN VAN WART, by ROY M. VAN WART, Natural Tutor, Respondent

Petition for Review of Decision of U. S. Board of Tax Appeals (District of Louisiana)

(March 12, 1934)

Before Bryan, Foster and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed March 12th, 1934

BRYAN, Circuit Judge:

Catherine L. Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones,

deceased. Dr. Roy M. Van Wart, Catherine's father, with whom she resided in Orleans Parish, Louisiana, after being confirmed by order of the district court for that Parish in accordance with the laws of Louisiana as her natural tutor or guardian, and after duly qualifying as such, demanded of the trustees under the will that they pay over to him the [fol. 35] accrued income of the trust created in favor of his ward. The trustees, claiming among other things the right to keep possession of the accumulations of such income until Catherine should become of age, when they conceded she would be entitled to the corpus as well as all accumulated income, declined to comply with that demand. Thereupon suit was brought in the name of the minor, by her father as next friend, in the federal court for the district in West Virginia in which the testator was residing at the time of his death, against the trustees to compel distribution of the income involved in accordance with the guardian's previous demand. That suit finally was decided in favor of the plaintiff, it being held that the guardian was entitled to receive from the trustees his ward's accumulated income and future income as it annually accrued. Van Wart v. Jones, 295 F. 287. Accordingly, in 1924 the trustees paid over to Dr. Van Wart as guardian the accumulated income of $160,000 and current income of $80,000; and Dr. Van Wart, acting as guardian and by authority of the court of his appointment, paid out of the funds so received by him a fee of $30,000 to the attorneys who brought the suit for their services in the litigation. In the income tax return for 1924, which was filed by the guardian on behalf of his ward, a deduction of the attorneys' fee was claimed. The deduction, though disallowed by the Commissioner of Internal Revenue, was allowed by the Board of Tax Appeals. And the Commissioner filed a petition for review.

The Board held that the attorneys' fee paid by the guardian was deductible as an ordinary and necessary expense incurred in carrying on a trade or business within the meaning of § 214 (a) (1), Revenue Act of 1924. 26 U. S. C. A. § 955. Its opinion, which is unreported but appears in the record, is based on its decision in Wurts-Dundas v. Commissioner, 17 B. T. A. 881, and on several [fol. 36] of its other decisions therein cited to the same effect. The Wurts-Dundas case was affirmed by the Circuit

Court of Appeals for the Second Circuit. 54 F. (2) 515. It is the contention of the Commissioner that the attorneys' fee was a personal expense of the minor taxpayer, and was not deductible because in computing net income deduction of the taxpayer's personal expenses is prohibited by § 215 (a) (1) of the same Revenue Act. 26 U. S. C. A. § 956.

We are constrained to agree with the Commissioner that in allowing the deduction the Board erred. An allowable expense is deductible only from the income of the taxpayer. The taxpayer's expenses incurred in carrying on a business are deductible, but his personal expenses are not. As in this case the income belonged to the minor, the ward, and not to the guardian, she and not he was the taxpayer. The attorneys' fee was an expense of litigation which was paid out of her income. She was not engaged in any business, and therefore as to her the fee was not a business expense. If she had been of legal age and had brought the suit against the trustees of her grandfather's estate in her own right, the amount of the fee would have been a personal expense for which she would not have been entitled to any deduction from her income. Commissioner v. Field, 42 F. (2) 820; Walker v. Commissioner, 63 F. (2) 351. The fact that she was a minor makes no difference. In the matter of personal expenses, the income tax law makes no distinction between a minor and an adult taxpayer; it treats them both alike. They would be treated very differently under the rule announced by the Court in the Wurts-Dundas case, supra, and followed by the Board in this case. Under that rule, the cost of litigation could be deducted from the minor's personal expenses by incurring it at any time before he or she came of age, whereas, as we have seen, such cost could not be so deducted in the case of an adult tax-
[fol. 37] payer; or where there were two beneficiaries of taxable income, one a minor and the other an adult, the former would but the latter would not be entitled to deduct the same sort of personal expenses. To follow such a rule would be, as it seems to us, to recognize a difference in tax liability where none was intended or authorized by the income tax law.

But it is said the guardian was engaged in business, the business of being a guardian; and that the fee incurred and paid to the attorneys in the litigation with the trustees was a necessary expense not of the guardian but of the guard-

ianship, which is spoken of as a separate entity. Whether or not being a guardian is doing business, it is unnecessary to decide. The fee was not an expense of the guardian or guardianship; it was paid out of the ward's income. That income was taxable not to him but to her. Busch v. Commissioner, 50 F. (2) 800. We are not here concerned with the case of a trust estate of such character that the income derived therefrom is taxable to the fiduciary. This is not that kind of a case.

The petition for review is granted, and the cause remanded for further proceedings not inconsistent with this opinion.

[fol. 38] No. 6990

COMMISSIONER OF INTERNAL REVENUE

versus

CATHERINE LLEWELLYN VAN WART, by ROY M. VAN WART, Natural Tutor

JUDGMENT

Extract from the Minutes of March 12th, 1934

This cause came on to be heard on the petition of the Commissioner of Internal Revenue for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that said petition be, and the same is hereby, granted; and that this cause be, and it is hereby, remanded to the said United States Board of Tax Appeals for further proceedings not inconsistent with the opinion of this Court.

[fol. 39] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify

that the pages numbered from 33 to 38 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 6990, wherein the Commissioner of Internal Revenue is petitioner, and Catherine Llewellyn Van Wart, by Roy M. Van Wart, Natural Tutor, is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 32 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 30th day of April, A. D. 1934.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted: And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,723. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 95. Catherine Llewellyn Van Wart, by Roy M. Van Wart, Natural Tutor, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1934. File No. 38,723. 95, O. T., 1934.

20

FILE COPY

FILED
JUN 6 193
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 95

CATHERINE LLEWELLYN VAN WART, By Roy M. Van Wart, Natural Tutor, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

FREDERICK R. GIBBS,
PRESTON B. KAVANAGH,
Counsel for Petitioner.

June 6, 1934.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Reasons relied on for allowance of writ	3
Brief in support of petition for writ of certiorari	5
I. Opinions below	5
II. Jurisdiction	5
III. Statement of the case	5
IV. Specification of errors	5
V. Summary of argument	6
VI. Argument	6
Conclusion	10

TABLE OF CITATIONS.

Commissioner v. Field, 42 F. (2d) 820	8
Commissioner v. Wurts-Dundas, 54 F. (2d) 515	3, 6, 7, 8
Kornhauser v. U. S., 276 U. S. 145	8
Merchants Loan & Trust Co. v. Smietanka, 255 U. S. 509	9
Van Wart v. Jones, 295 F. 287	2
Title 28, U. S. C., Sec. 347	5
Revenue Act of 1924, c. 234, 43 Stat. 254	
Sec. 2 (a) (9)	7
200 (b)	7
214 (a) (1)	6
215 (a) (1)	6
219 (a) (2), (b)	7
225 (a) (4), (b)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. ———

CATHERINE LLEWELLYN VAN WART, By Roy M. Van Wart, Natural Tutor, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Catherine Llewellyn Van Wart, a minor, by Roy M. Van Wart, her natural tutor, and guardian, respectfully shows:

A.

Summary Statement of Matter Involved.

This is a petition for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in said Court on March 12, 1934. This

judgment reversed an unreported decision of the United States Board of Tax Appeals which found that there was no deficiency in income taxes for the calendar year 1924.

The sole question involved is whether attorneys' fees, incurred and paid by the guardian in his fiduciary capacity, for conducting certain litigation which resulted in securing for the guardianship a substantial amount of income, are a business expense under the provisions of the Revenue Act of 1924 and therefore deductible from gross income in the income tax return filed by the guardian on behalf of the minor.

The facts are contained in a stipulation (R. 19-21) and in the decision of the Circuit Court of Appeals, Fourth Circuit, of *Van Wart v. Jones, et al.*, 295 Fed. 287, which decision by reference was made a part of said stipulation of facts.

Catherine Llewellyn Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones, deceased. Her father, Roy McLean Van Wart, was appointed by the Civil District Court in New Orleans, Louisiana, as her natural tutor or guardian on May 6, 1921. Upon demand by the guardian for the income due the minor, the trustees under the will of Jenkins Jones took the position that the income of the trust was to be accumulated until the minor became of age, when she was to receive the corpus. Thereupon Roy Van Wart, as guardian of petitioner, employed counsel and filed suit to compel the trustees to distribute the income of the trust estate as currently earned. A favorable decree was finally entered by the Circuit Court of Appeals for the Fourth Circuit in *Van Wart v. Jones, et al., supra*, and accordingly the trustees in 1924 paid to Roy Van Wart, as guardian, accumulated income of $159,094.16 and thereafter paid the 1924 income of $80,241.68. Under authority of the Court appointing the guardian, attorneys' fees of $30,000 were allowed and paid in 1924 by the guardian for services in this litigation.

In the income tax return for the year 1924, filed by Roy Van Wart as guardian of petitioner, the sum of $30,000 was claimed as a deduction from gross income. The respondent disallowed the deduction as not being a business expense, but on appeal to the United States Board of Tax Appeals petitioner's contention was sustained (R. 22). The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals and held that the payment of attorneys' fees was an expense personal to the minor and therefore not deductible (R. 33). In so holding the Circuit Court held contrary to the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner of Internal Revenue v. Wurts-Dundas*, 54 Fed. (2d) 515, where under similar facts that Court held that the payment of attorneys fees by the guardian was an expense incident to carrying on the business of administering the ward's estate and hence deductible as a business expense in the guardian's fiduciary return.

B.

Reasons Relied Upon for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals of the Fifth Circuit, holding that the payment of attorneys' fees is a personal expense to the minor and therefore non-deductible under Section 215 (a) of the Act is in direct conflict with that of the Circuit Court of Appeals of the Second Circuit in *Commissioner v. Wurts Dundas, supra.*

2. The Circuit Court of Appeals has decided an important question of Federal Income Tax law which has not been, but should be, settled by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on

its docket No. 6990, *Commissioner of Internal Revenue v. Catherine Llewellyn Van Wart, by Roy M. Van Wart, Natural Tutor,* and that the judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CATHERINE LLEWELLYN VAN WART,
By Roy M. Van Wart, Natural Tutor.

By FREDERICK R. GIBBS,
PRESTON B. KAVANAGH,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 33) is reported in 69 Fed. (2d) 299. The opinion of the United States Board of Tax Appeals (R. 21) reversed by the Circuit Court, is unreported.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 347, Title 28, U. S. C. Final judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 12, 1934 (R. 36).

III.

Statement of the Case.

A statement of the case has been given under heading "A" in the petition and for the sake of brevity is not repeated here.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that the expense of attorneys' fees incurred and paid by the guardian in his fiduciary capacity was an unalllowable deduction upon the income return filed by the guardian.

2. The Circuit Court of Appeals erred in finding and holding that such expense was not an ordinary and necessary expense incurred by the fiduciary in carrying on the business of administering the guardianship matter.

3. The Circuit Court of Appeals erred in finding and holding that such expense was an unallowable personal expense of the minor child.

V.

Summary of Argument.

A. Statutes Involved.

B. The decision of the Circuit Court of Appeals in the case at bar is in conflict with that of the Circuit Court of Appeals for the Second Circuit in *Commissioner of Internal Revenue v. Wurts-Dundas,* 54 Fed. (2d) 515.

C. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

1. The guardian in his fiduciary capacity, and not the minor, is the taxpayer.

VI.

Argument.

A. Statutes Involved.

Revenue Act of 1924, C. 234, 43 Stat. 254;

Sec. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * * (c. 234, sec. 214, 43 Stat. 269.)

Sec. 215. (a) In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses; (c. 234, sec. 215, 43 Stat. 271.)

Sec. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * * * * * *

(2) Income * * * collected by a guardian of an infant which is to be held or distributed as the Court may direct;

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. * * *

(c. 234, sec. 219, 43 Stat. 275.)

Sec. 200. (b) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(c. 234, sec. 200, 43 Stat. 254.)

Sec. 225. (a) Every fiduciary * * * shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, * * *

(4) Every estate or trust the net income of which for the taxable year is $1000 or over;

(b) * * * Any fiduciary required to make a return under this chapter shall be subject to all the provisions of this chapter which apply to individuals.

(c. 234, sec. 225, 43 Stat. 280.)

Sec. 2. (a) (9) The term "taxpayer" means any person subject to a tax imposed by this Act.

(c. 234, sec. 2, 43 Stat. 254.)

B. In *Commissioner of Internal Revenue v. Wurts-Dundas*, 54 Fed. (2d) 515, (certiorari not applied for) the Circuit Court of Appeals, Second Circuit, affirmed the decision of the United States Board of Tax Appeals, in 17 B T. A. 881. The Central Union Trust Company, of New

York City, as guardian of Muriel Wurts-Dundas, a minor, was compelled to proceed before the Orphans Court, of Philadelphia, Pennsylvania, for a construction of the will of J. Dundas Lippincott, deceased, and a determination of the income to which the minor was entitled. It was necessary to employ counsel, which employment resulted in a decree upholding the contention of the guardian, which was later affirmed by the Supreme Court of Pennsylvania. The said attorneys were paid $25,000 by the guardian, out of moneys belonging to its ward, which amount was claimed as a deduction in the Federal income tax return filed by the guardian.

The Second Circuit Court of Appeals decided that reasonable attorneys' fees were an ordinary and necessary expense of the guardianship, citing *Kornhauser v. U. S.*, 276 U. S. 145, 152, and were a business expense. At page 516 the Court said:

> "But where a guardian incurs reasonable and necessary expenses in securing the income to which it is entitled as guardian, it is acting wholly in its capacity as a fiduciary, and is carrying on the business of administering its ward's estate. The income received is the income which results from the guardian's conduct of that business, whatever may be the source of the income. The expenses of the guardian are the expenses of that business."

In the case at bar, the Court held that inasmuch as the income secured by the guardian belonged to the ward, and the attorneys' fees were paid out of the ward's money, the expense was that of the ward. Since the expense was not connected with any business in which the ward might have been engaged, it was held, therefore, to be personal and not deductible under Section 215 (a) of the 1924 Revenue Act, citing *Commissioner v. Field*, 42 Fed. (2d) 820.

The *Field* and the *Wurts-Dundas* cases were both decided by the Second Circuit which aptly distinguished these two cases.

C. This Court has never passed on the question whether a guardian is entitled to a deduction of attorneys' fees, as a business expense, in the income tax return which he, as a fiduciary, is charged with filing and where he is subject to the tax disclosed thereon. Petitioner contends that, while the income collected from the trustees of the estate of Jenkins Jones ultimately belongs to the ward, such income is subject to the demands of the guardian and the orders of the Court which appointed him, as well as the proper expenses incurred by the guardian.

1. The Guardian and Not the Ward is the Taxpayer.

Under the heading "Estate and Trusts," Section 219(a) of the 1924 Revenue Act, imposes the tax upon "income of estates or of any kind of property held in trust," including (2) income "collected by a guardian of an infant which is to be held or distributed as the Court may direct." Under Section 219 (b) the tax shall be computed upon the net income of the estate or trust and "shall be paid by the fiduciary," and in Section 200 (b) the term "fiduciary" means "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." By Section 225 (a) the fiduciary is charged with making the return and (b) of the same section makes him "subject to all the provisions of the Act which apply to individuals." Finally, Section 2 (a) (9) defines the taxpayer as "any person subject to a tax imposed by this Act."

In the face of these various provisions of the taxing Act, it is difficult to see how the Court below could reach the conclusion that this was not "the case of a trust estate of such character that the income derived therefrom is taxable to the fiduciary." The guardian is similar to any other trustee and is a "taxable person" as distinguished from his ward. *Merchants Loan & Trust Company v. Smietanka*, 255 U. S. 509 at 516. The guardian incurred and paid the

expenses, not the ward. He, as fiduciary, was charged with filing the return and paying the tax.

Conclusion.

It is, therefore, respectfully submitted that a writ of certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

FREDERICK R. GIBBS,
PRESTON B. KAVANAGH,
Counsel for Petitioner.

21

FILE COPY

FILED
OCT 29 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 95.

CATHERINE LLEWELLYN VAN WART, By Roy M. Van Wart, Natural Tutor, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF FOR PETITIONER.

FREDERICK R. GIBBS,
PRESTON B. KAVANAGH,
Counsel for Petitioner

October 22, 1934.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Official Reports of the Opinions Delivered Below	1
Jurisdiction	2
Statement of the Case	2
Specification of Errors	3
Summary of Argument	4
Argument	5
A. Statutes involved	5
B. The guardian and not the ward is the taxpayer	6
C. The attorneys' fee is a necessary business expense of the guardian	7
D. The decision of the Lower Court is contrary to the decisions of the Circuit Court of Appeals, for the Second Circuit, and the Board of Tax Appeals, as well as the Rulings of the Bureau of Internal Revenue	9

TABLE OF AUTHORITIES.

CASES CITED:

Busch v. Commissioner, 50 F. (2d) 800	7
Chicago Title & Trust Co. v. Commissioner, 18 B. T. A. 395	11
Commissioner v. Field, 42 F. (2d) 820	9
Commissioner v. Wurts-Dundas, 54 F. (2d) 515	3, 4, 7, 9
Flint v. Stone Tracy Co., 220 U. S. 107	8
Franklin v. Commissioner, 11 B. T. A. 148	11
Grandin v. Commissioner, 16 B. T. A. 515	11
Kenan v. Bowers, 50 F. (2d) 112	11
Knox v. Commissioner, 3 B. T. A. 143	11
Kornhauser v. U. S., 276 U. S. 145	7
Lindley v. Commissioner, 63 F. (2d) 807	11
Merchants L. & T. Co. v. Smietanka, 255 U. S. 509	6, 7

Page

Sparrow v. Commissioner, 18 B. T. A. 1 11
Van Wart v. Jones, 295 Fed. 287 ..... 2, 3
Walker v. Commissioner, 63 F. (2d) 351 ..... 9, 10
Walker v. Commissioner, 20 B. T. A. 937 10
Wurts-Dundas v. Commissioner, 17 B. T. A. 881 11

STATUTES CITED:

Revenue Act of 1924, C. 234, 43 Stat. 254
Secs. 2 (a) (9) 6
200 (b) 5, 6
214 (a) (1) 2, 5, 7
215 (a) (1) 5
219 (a) (2) (b) 5, 6
225 (a) (4) (b) 5, 6

Rulings of the Bureau of Internal Revenue

O. D. 537; C. B. 2 175 12
I. T. 2288; C. B. IV-2 50 12
I. T. 2124; C. B. IV-1 138 13

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 95.

CATHERINE LLEWELLYN VAN WART, By Roy M. Van Wart, Natural Tutor, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF FOR PETITIONER.

I.

OFFICIAL REPORTS OF THE OPINIONS DELIVERED BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 23), is reported in 69 F. (2d) 299. The memorandum opinion of the Board of Tax Appeals (R. 14) is unreported.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 12, 1934 (R. 26). The petition for a writ of certiorari was filed on June 6, 1934, and was granted on October 8, 1934 (R. 29). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C.).

III.

STATEMENT OF THE CASE.

The sole question involved is whether an attorneys' fee, incurred and paid by a guardian in his fiduciary capacity, for conducting certain litigation which resulted in securing for the guardianship a substantial amount of income, is a business expense under Section 214 (a) (1) of the Revenue Act of 1924 and therefore deductible from gross income in the income tax return filed by the guardian for a minor child.

The facts are contained in a stipulation (R. 13) and in the decision of the Circuit Court of Appeals, Fourth Circuit, of *Van Wart v. Jones, et al.*, 295 Fed. 287, which decision by reference was made a part of said stipulation of facts.

Catherine Llewellyn Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones, deceased. Her father, Roy McLean Van Wart, was appointed by the Civil District Court in New Orleans, Louisiana, as her natural tutor or guardian on May 6, 1921. Upon demand by the guardian for the income due the minor, the trustees under the will of Jenkins Jones took the position that the income of the trust was to be accumulated until the minor became of age, when she was to receive the corpus. Thereupon Roy Van Wart, as guardian, employed counsel and filed suit to compel the trustees to

distribute the income of the trust estate as currently earned. A favorable decree was finally entered by the Circuit Court of Appeals for the Fourth Circuit in *Van Wart v. Jones, et al., supra,* and accordingly the trustees in 1924 paid to Roy Van Wart, as guardian, accumulated income of $159,094.16 and thereafter paid to him the 1924 income of $80,241.68. Under authority of the Court appointing the guardian, an attorneys' fee of $30,000 was allowed and paid in 1924 by the guardian for services in this litigation.

In the income tax return for the year 1924, filed by Roy Van Wart as guardian of petitioner, the sum of $30,000 was claimed as a deduction from gross income. The respondent disallowed the deduction as not being a business expense, but on appeal to the United States Board of Tax Appeals petitioner's contention was sustained (R. 15). The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals and held that the payment was an expense personal to the minor and therefore not deductible (R. 23). In so holding the Circuit Court held contrary to the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner of Internal Revenue v. Wurts-Dundas,* 54 F. (2d) 515, where under similar facts that Court held that the payment of attorneys' fees by the guardian was an expense incident to carrying on the business of administering the ward's estate and hence deductible as a business expense in the guardian's return.

IV.

SPECIFICATION OF ERRORS.

The petitioner intends to urge the errors that are specified on pages 5 and 6 of the petition for certiorari filed herein, namely:

1. The Circuit Court of Appeals erred in finding and holding that the expense of an attorneys' fee, incurred and paid by the guardian in his fiduciary capacity, was

an unallowable deduction upon the income tax return filed by the guardian.

2. The Circuit Court of Appeals erred in finding and holding that such expense was not an ordinary and necessary expense incurred by the fiduciary in carrying on the business of administering the guardianship matter.

3. The Circuit Court of Appeals erred in finding and holding that such expense was an unallowable personal expense of the minor child.

V.

SUMMARY OF ARGUMENT.

A—Statutes involved.

B—The guardian is by statute required to file the return and pay the tax. He, in his fiduciary capacity, is the taxpayer as distinguished from the ward.

C—The attorneys' fee paid by the guardian is an ordinary and necessary expense, incurred and paid by him in carrying on or administering the business of his guardianship. Being an expense of the guardian it cannot at the same time be a personal expense, incurred and paid by the ward.

D—The decision of the Court below is in conflict with *Commissioner of Internal Revenue v. Wurts-Dundas*, 54 F. (2d) 515, decided by the Circuit Court of Appeals, Second Circuit. It is also contrary to decisions of the Board of Tax Appeals and rulings of the Bureau of Internal Revenue.

VI.

ARGUMENT.

A—Statutes Involved.

Revenue Act of 1924, C. 234, 43 Stat. 254;

Sec. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * * (c. 234, sec. 214, 43 Stat. 269).

Sec. 215. (a) In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses (c. 234, sec. 215, 43 Stat. 271).

Sec. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * * * * * * *

(2) Income * * * collected by a guardian of an infant which is to be held or distributed as the Court may direct;

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. * * * (c. 234, sec. 219, 43 Stat. 275.)

Sec. 200. (b) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person. (c. 234, sec. 200, 43 Stat. 254.)

Sec. 225. (a) Every fiduciary * * * shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, * * *

(4) Every estate or trust the net income of which for the taxable year is $1000 or over;

(b) • • • Any fiduciary required to make a return under this chapter shall be subject to all the provisions of this chapter which apply to individuals. (c. 234, sec. 225, 43 Stat. 280.)

Sec. 2. (a) (9) The term "taxpayer" means any person subject to a tax imposed by this Act. (c. 234, sec. 2, 43 Stat. 254.)

B—The Guardian and not the Ward is the Taxpayer.

Under the heading "Estate and Trusts" of the 1924 Revenue Act, Section 219 (a) thereof imposes the tax upon "income of estates or of any kind of property held in trust," including (2) income "collected by a guardian of an infant which is to be held or distributed as the Court may direct." Under Section 219 (b) the tax shall be computed upon the net income of the estate or trust and "shall be paid by the fiduciary," and in Section 200 (b) the term "fiduciary" means "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." By Section 225 (a) the fiduciary is charged with making the return and (b) of the same section makes him "subject to all the provisions of the Act which apply to individuals." Finally, Section 2 (a) (9) defines the taxpayer as "any person subject to a tax imposed by this Act."

In the face of these various provisions of the taxing Act, it is difficult to see how the Court below could reach the conclusion that this was not "the case of a trust estate of such character that the income derived therefrom is taxable to the fiduciary." The guardian is similar to any other trustee or fiduciary and is a "taxable person" as distinguished from his ward. *Merchants Loan & Trust Company v. Smietanka*, 255 U. S. 509 at 516. The guardian incurred and paid the expenses, not the ward. He, as fiduciary, was charged with filing the return and paying the tax.

The case of *Busch v. Commissioner*, 50 F. (2d) 800, cited by the lower Court as authority for its conclusion that the income was taxable to the ward, does not so decide as we read it. The Busch case held that one of the beneficiaries of a trust could not deduct in his personal return a part of the losses claimed and taxes paid by the trust, notwithstanding that he was both beneficiary and trustee thereof. The court there restated the principle which we urge, that a trust is an entity, entirely separate from its beneficiaries, citing *Merchants Loan and Trust Company v. Smietanka, supra.*

The aforesaid provisions of the Act make no distinction between a guardian and any other form of fiduciary. Each is charged with filing the return of *net* income, not *gross* income, the result of respondent's contention here, and paying the tax due thereon.

C—The Attorneys' Fee is a Necessary Business Expense of the Guardian.

Respondent must concede that the payment of the attorneys' fee was "an ordinary and necessary" expense, aside from the question whether it was a business or personal expense. The guardian was acting strictly in the discharge of his duty, and in fact had no alternative or discretion in the matter, once it was established that the trustees were withholding income from him in his fiduciary capacity. The law demanded that he take appropriate action to recover the income for his ward and the conduct of the resulting litigation, through the Circuit Court of Appeals, of necessity required the employment of competent counsel and payment of reasonable charges for services rendered. *Kornhauser v. United States*, 276 U. S. 145, 152; *Commissioner v. Wurts-Dundas*, 54 F. (2d) 515.

The only other requirement of Section 214 (a) (1) of the Act is that the payment made by the fiduciary be a "business" expense. We agree that the item of expense was in

no sense connected with Roy Van Wart's individual business or profession, and that the ward herself was engaged in no business. The question is whether or not administering this guardianship matter, involving as it did the procurement of substantial amounts of income for the trust, is in itself doing "business" within the meaning of the statute. No question arises as to the expense being a charge against the corpus of the estate. This is not that case.

"Business" has been defined by this Court in *Flint v. Stone Tracy Company*, 220 U. S. 107, 171, as "a very comprehensive term and embraces everything about which a person can be employed."

The record discloses that Roy Van Wart was duly appointed guardian and was therefore charged with the duty to conserve, protect and increase, if possible, the income of the minor; that acting in this fiduciary capacity he employed counsel and conducted protracted litigation; that he was successful in securing approximately $160,000 of accrued income for the benefit of his ward, as well as 1924 income of approximately $80,000; that under order of the Court he paid counsel from these funds $30,000.00 for services rendered; that as a fiduciary he filed an income tax return and paid the tax shown thereon. The Court will take judicial notice that the guardian is required to file accounts with and secure the approval of the Court which appointed him, whenever investing, reinvesting or disbursing any part of these substantial trust funds. All of these acts, we confidently assert, constitute the business of administering a guardianship and the payment of a necessary attorneys' fee by the fiduciary from trust income is an expense incident to that business and deductible for income tax purposes.

D—The Decision of the Lower Court is Contrary to the Decisions of the Circuit Court of Appeals for the Second Circuit and the Board of Tax Appeals, as Well as the Rulings of the Bureau of Internal Revenue.

The decision of the Court below is in direct conflict with the decision of the Second Circuit in *Commissioner v. Wurts-Dundas* (*supra*), where the facts were similar and the expense was allowed the guardian as a business deduction. Contrary to that decision, the Court below held that since the expense was paid from the ward's income, she must be treated like an adult taxpayer, who under similar circumstances would not be entitled to the deduction because it would be classed as a personal expense. In support of this conclusion the lower Court cites *Commissioner v. Field*, 42 F. (2d) 820, decided by the Second Circuit, and *Walker v. Commissioner*, 63 F. (2d) 351, decided by the Third Circuit. The *Field* case is clearly distinguished by the Second Circuit in its subsequent decision in the *Wurts-Dundas* case from which we quote at length, page 516:

> "We are told that this case is ruled by our decision in Commissioner of Internal Revenue v. Field, 42 F. (2d) 820. In that case, however, the beneficiary of a trust incurred expenses for attorneys' fees himself. He had no guardian. Field was not in agreement with the other trustees as to his own right to receive, after his brother's death, the portion of the corpus which had been left in trust for that brother. In his own behalf and for his own personal benefit, he employed and paid the attorneys the fees he sought to have deducted from his own gross income as a business expense. We held that the expense of attorneys' fees to Field of the securing by Field of a judgment which established his claimed right to the present unrestricted enjoyment of a portion of the trust estate was a personal expense which he incurred in protecting his own property and for which Congress had not seen fit to allow any deduction. But, where a guardian incurs reasonable and necessary expenses in securing the income to which it is entitled as guardian, it is acting wholly in its ca-

pacity as a fiduciary, and is carrying on the business of administering its ward's estate. The income received is the income which results from the guardian's conduct of that business, whatever may be the source of the income. The expenses of the guardian are the expenses of that business. In the end, of course, the ward gets the benefit, if any, and must bear the expense; but the statute in section 219 (b) of the 1921 act provides for the return of income by the guardian and in section 219 (d) requires distributable income to be included whether distributed or not, so that the guardian may be, and no doubt often is, required to include income as of a time before it reaches the ward and before it has actually been withdrawn from the business through which the special circumstances of the ward compel it to be received. *Unless the true status of the guardian is confused with that of a mere agent for the ward, it will be seen that the return of income filed by the guardian is to reflect as net income to the ward the remainder of gross income after deducting the ordinary and necessary expenses paid or incurred by the guardian in doing its work in securing for its ward the income the ward receives, remotely from whatever source, but directly from what the necessity for the guardianship has made the business of a guardianship.*" (Italics ours)

Respondent did not petition for certiorari in the *Wurts-Dundas* Case.

Similarly, *Walker v. Commissioner, supra,* decided that the beneficiary of a trust, who personally employed and paid attorneys, in a suit to surcharge her trustees for mismanagement, was not entitled to deduct her attorneys' fee as a business expense. The court merely held that she was not engaged in any trade or business and affirmed the decision of the Board of Tax Appeals (20 B. T. A. 937). Before the Board the beneficiary contended that she was entitled to the deduction because of previous Board decisions in favor of similar allowances to fiduciaries. The Board answered this contention as follows, pages 946-947:

"Those proceedings, however, related to the deduction of attorneys' fees paid by fiduciaries, and we based our decisions in the proceedings on the proposition that under the law it is the duty of fiduciaries to protect the interests and income of the estates committed to their care; that so far as such protection is a duty it is the business of the fiduciaries, and that therefore any expenses, including attorneys' fees, properly incurred are expenses incurred in carrying on a business. It is manifest, therefore, that the decisions referred to are not applicable to the facts of this proceeding."

The issue has also been presented in two other Circuit Court cases where the beneficiaries of trusts sought the deduction of attorneys' fees as a business expense. In each case the deduction was disallowed as being a personal expense incurred and paid by taxpayers in protecting their individual property. *Kenan, et al. v. Bowers,* 50 F. (2d) 112; *Lindley v. Commissioner,* 63 F. (2d) 807. In the *Lindley* case the court took occasion to distinguish the deduction allowed in the *Wurts-Dundas* decision in the following language, page 808:

"But it must be noticed that the expenses were in no sense personal and were incurred in the performance of a duty to obtain all income belonging to the guardianship."

The Board of Tax Appeals has consistently held that payment of attorneys' fees by a fiduciary to procure or produce income for the estate is a necessary business expense incurred in carrying on the business of the estate. *Grace M. Knox, Executrix v. Commissioner,* 3 B. T. A. 143; *Thomas H. Franklin, et al., Executors v. Commissioner,* 11 B. T. A. 148; *Florence Grandin v. Commissioner,* 16 B. T. A. 515; *Wurts-Dundas v. Commissioner,* 17 B. T. A. 881; *Margaret B. Sparrow et al., Trustees v. Commissioner,* 18 B. T. A. 1; *Chicago Title & Trust Co., et al., Trustees v. Commissioner,* 18 B. T. A. 395.

No appeal was taken by the Government from any of the above decisions with the exception of the *Wurts-Dundas* case, which, as previously stated, was affirmed.

The Bureau of Internal Revenue has repeatedly considered the deductibility of expenses in connection with the administration of estates. Commissions paid to executors and administrators and other proper expenses incident to the settlement of an estate, and incurred primarily with respect to the liquidation and distribution of assets, are properly held to be a direct charge against the corpus of the estate, and are therefore not deductible for income tax purposes. But where the fiduciary incurs expenses with respect to any current income which the estate might derive during the process of administration, such expenses are deductible as business expenses. In Office Decision 537, Cumulative Bulletin 2, page 176, in considering a similar section of the 1918 Revenue Act, it is stated:

> "The only provision in that section by virtue of which expenses of administration are deductible is the one providing for the deduction of expenses of *carrying on a trade or business*. Under a liberal construction of the language used it seems possible to hold that expenses having a reasonable, proximate relation to the *collection of income* due an estate are deductible." (Italics ours.)

Again in I. T. 2238, Cumulative Bulletin IV-2, page 50, the following language is used:

> "The relationship between committee and ward is analogous to that existing between *guardian and minor*. In either case the costs of the services of the fiduciary and the incidental expenses connected with the management of income-producing property or funds belonging to the *ward or minor*, or the *collection of any income* inuring to him, whether or not derived from the property under the control of the fiduciary, are essentially ordinary and necessary expenses incurred with respect to the income of such ward or minor, and *fulfill the requirements of Section 214 (a) 1.*" (Italics ours.)

Also, an attorneys' fee, paid by a guardian to secure his appointment to permit his receipt of income for the ward, has been held to be an ordinary and necessary business expense, deductible in the return filed for the ward (I. T. 2124, Cumulative Bulletin IV-1, page 138).

The court below seeks to differentiate between a guardian and other fiduciaries and would disallow the deduction because the expense is paid from income which eventually the ward will enjoy. To permit the deduction, the Court holds, would give the minor an unfair advantage as compared with an adult taxpayer to whom such an expense would be personal and not deductible.

We submit that the comparison should be between fiduciaries and not between a minor, who does not personally incur or pay the expense, and an adult taxpayer who receives his income direct and personally incurs and pays the attorneys' fee. If in the instant case, the beneficiary was of age and the trustees of the estate of Jenkins Jones had been compelled to institute suit to recover income due them from some third party, the expense of such litigation would be a proper deduction in the return filed by them. The beneficiary would pay a tax on the amount distributed to her. There should be no distinction between fiduciaries and plainly the sections of the Act, heretofore enumerated, intend none. To so hold will be in accord with the line of decisions of the Circuit Court of Appeals for the Second Circuit, the decisions of the Board of Tax Appeals, and the rulings of the Bureau of Internal Revenue.

We respectfully submit that the judgment in this case should be reversed.

FREDERICK R. GIBBS,
PRESTON B. KAVANAGH,
Counsel for Petitioner.

October 22, 1934.

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 95

CATHERINE LLEWELLYN VAN WART, BY ROY M. VAN WART, Natural Tutor, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition.

The question is whether attorneys' fees expended by a guardian in litigation on behalf of the ward's estate are deductible from gross income. The decision in the instant case is in conflict with the decision in *Commissioner* v. *Wurts-Dundas*, 54 F. (2d) 515 (C.C.A. 2d), where it was held that attorneys' fees expended by the guardian in securing income to which the ward was entitled constituted an expense in carrying on the business

of administering the ward's estate. In the instant case the Circuit Court of Appeals for the Fifth Circuit, in refusing to follow the *Wurts-Dundas* case, said (R. 35):

> In the matter of personal expenses, the income tax law makes no distinction between a minor and an adult taxpayer; it treats them both alike. They would be treated very differently under the rule announced by the Court in the Wurts-Dundas case, supra, and followed by the Board in this case. Under that rule, the cost of litigation could be deducted from the minor's personal expenses by incurring it at any time before he or she came of age, whereas, as we have seen, such cost could not be so deducted in the case of an adult taxpayer; or where there were two beneficiaries of taxable income, one a minor and the other an adult, the former would but the latter would not be entitled to deduct the same sort of personal expenses. To follow such a rule would be, as it seems to us, to recognize a difference in tax liability where none was intended or authorized by the income tax law.

The respondent believes that the decision of the Circuit Court of Appeals in the instant case is correct, and is supported in principle by *Commissioner* v. *Field*, 42 F. (2d) 820 (C.C.A. 2d). However, due to the conflict above pointed out, as well as because of the importance of the question, the re-

spondent does not oppose the issuance of the writ of certiorari.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	3
Argument	4
Conclusion	12
Appendix	13

CITATIONS

Cases:

Ames v. *Commissioner*, 49 F. (2d) 853	7, 8
Buckwalter v. *Commissioner*, 61 F. (2d) 571	8
Commissioner v. *Field*, 42 F. (2d) 320	4, 5
Commissioner v. *Wurts-Dundas*, 54 F. (2d) 515	11, 12
Douglas v. *Commissioner*, 1 B. T. A. 372	5
Freuler v. *Helvering*, 291 U. S. 35	7, 11
Hutchings v. *Burnet*, 58 F. (2d) 514	4, 5
Kornhauser v. *United States*, 276 U. S. 145	4
Lamar v. *Micou*, 112 U. S. 452	6
Liberman's Committee v. *Commissioner*, 54 F. (2d) 527	7, 11
Linderman v. *Commissioner*, 28 B. T. A. 113, pending C. C. A. (3d)	6
Lindley v. *Commissioner*, 63 F. (2d) 807	4, 5
McConnell v. *Commissioner*, 3 B. T. A. 260	5
Merchants' L. & T. Co. v. *Smietanka*, 255 U. S. 509	9
Refling v. *Burnet*, 47 F. (2d) 859	8
Spicer v. *Smith*, 288 U. S. 430	6
Sprunt, Alexander, & Son v. *Commissioner*, 64 F. (2d) 424	4
Ullman v. *Commissioner*, 6 B. T. A. 100	5
von Echt v. *Commissioner*, 21 B. T. A. 702	5
Walker v. *Commissioner*, 63 F. (2d) 351, certiorari denied, 289 U.S. 746	4, 5

Statutes:

Revenue Act of 1916, c. 463, 39 Stat. 756, 757, Sec. 2	9
Revenue Act of 1917, c. 63, 40 Stat. 300, 331, Sec. 1204	10
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Sec. 2 (U. S. C., Title 26, Sec. 1262)	13
Sec. 200 (U. S. C., Title 26, Sec. 931)	13
Sec. 210 (U. S. C., Title 26, Sec. 951)	13
Sec. 214 (U. S. C., Title 26, Sec. 955)	14
Sec. 215 (U. S. C., Title 26, Sec. 956)	14
Sec. 219 (U. S. C., Title 26, Sec. 960)	14
Sec. 225 (U. S. C., Title 26, Sec. 966)	15

94151—34——1

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 95

CATHERINE LLEWELLYN VAN WART, BY ROY M. VAN WART, Natural Tutor, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 14–15) is not reported. The opinion of the Circuit Court of Appeals (R. 23–26) is reported in 69 F. (2d) 299.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934. (R. 26.) The petition for a writ of certiorari was filed June 6, 1934,

and was granted October 8, 1934. (R. 29.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner, a minor, deducted from the gross income reported on her behalf attorneys' fees paid out of her income by her guardian in a suit to reduce to immediate possession accrued income of a trust created for her benefit. The question involved is whether such expenditure is an ordinary and necessary expense paid in carrying on a business.

STATUTE INVOLVED

The statute involved will be found in the Appendix, *infra*, pp. 13–16.

STATEMENT

The facts are contained in a stipulation (R. 13–14) and in the decision of the Circuit Court of Appeals for the Fourth Circuit, reported in 295 Fed. 287, which decision by reference was made a part of the stipulation.

During the taxable year 1924, the petitioner was a minor and beneficiary of a trust created by the will of her grandfather. Her duly appointed and qualified tutor or guardian was Roy McLean Van Wart, her father.

The guardian instituted suit to compel the trustees under the grandfather's will to pay over to

him the accumulated income of the trust created in favor of his ward. A favorable decree was finally entered, and, accordingly, the trustees paid to the guardian all of the income which had accumulated.

On April 11, 1924, the guardian, by authority of the court of his appointment, paid out of the funds so received by him, a fee of $30,000 to a firm of attorneys for their services in the litigation.

In the income-tax return for the year 1924 filed by the guardian on behalf of the petitioner, a deduction against gross income of $30,000 was claimed on account of the attorneys' fees paid. The respondent disallowed the deduction, and, on appeal, his action was reversed by the Board of Tax Appeals. (R. 14–15.) The Circuit Court of Appeals, in turn, reversed the Board. (R. 23–26.)

SUMMARY OF ARGUMENT

The petitioner is not entitled to the deduction claimed, for the reasons that she was not engaged in any business, a fact which she concedes; that similar expenditures have been disallowed as personal expenses when made by adults and the statute makes no distinction between a minor and an adult; that she was the taxpayer and not the guardian; that the mere receipt and distribution of the ward's income does not constitute a business carried on by the guardianship; and that neither the guardian nor the guardianship is recognized by the statute as the "taxpayer."

ARGUMENT

The petitioner contends that the attorneys' fees in question are deductible from her gross income as an ordinary and necessary expense paid in carrying on a business. The respondent disallowed the deduction, holding that it was a personal expense.

The petitioner concedes that she was engaged in no business. (Pet. Br. 8.) This concession would appear sufficient to warrant determination of the question here involved against the petitioner. *Hutchings* v. *Burnet,* 58 F. (2d) 514 (App. D. C.); *Commissioner* v. *Field,* 42 F. (2d) 820 (C. C. A. 2d); *Walker* v. *Commissioner,* 63 F. (2d) 351 (C. C. A. 3d), certiorari denied, 289 U. S. 746; *Lindley* v. *Commissioner,* 63 F. (2d) 807 (C. C. A. 2d). Payments made for services of counsel in a suit are ordinary and necessary business expenses and deductible only if the suit is directly connected with, or proximately results from, the taxpayer's business. *Kornhauser* v. *United States,* 276 U. S. 145. That case involved the deductibility of attorneys' fees paid to retain earnings of the taxpayer's business. The same principle would apply to attorneys' fees paid in a suit to recover business income. *Alexander Sprunt & Son* v. *Commissioner,* 64 F. (2d) 424 (C. C. A. 4th). Since petitioner was engaged in no business, there can be no deduction for a business expense.

Expenses similar to the one here involved, when claimed by an adult, have consistently been held to

be of a personal character and not deductible under the statute. (*Lindley, Hutchings, Walker,* and *Field* cases, *supra.*)[1] There appears to be no reason why a different rule should obtain when the expenditure is made by or on behalf of a minor. There is nothing in the statute indicating any such distinction. As the court below said (R. 25):

> In the matter of personal expenses, the income tax law makes no distinction between a minor and an adult taxpayer; it treats them both alike.

The petitioner argues that the attorneys' fees are deductible from her gross income because the expense was paid not by her but by the guardian, and because the guardian, and not she, is the taxpayer. (Pet. Br. 6–8.) The only income tax return involved in these proceedings is that of the petitioner, filed on her behalf by the guardian. The deficiency asserted arises from the elimination of a deduction claimed on her return. If the fees were not paid by her, or paid on her behalf, there would be no foundation for a claim to a deduction from her gross income of the expense here involved. Petitioner assumes that the income reported by her is not her income, but that of the guardian, and that the guardian, and not she, is the taxpayer. From

[1] See also the following decisions of the Board of Tax Appeals to the same effect: *Douglas* v. *Commissioner*, 1 B. T. A. 372; *McConnell* v. *Commissioner*, 3 B. T. A. 260; *Ullman* v. *Commissioner*, 6 B. T. A. 100; *von Echt* v. *Commissioner*, 21 B. T. A. 702.

this assumption, the petitioner argues that the guardian is engaged in the business of administering her affairs and that an expense incurred by him in this administration is an allowable deduction from her gross income.

The statute defines the term "taxpayer" as any person subject to a tax imposed by the Act. Section 2 (a) (9), Revenue Act of 1924, *infra*, p. 13. The term "person" means "an individual, a trust or estate, a partnership, or a corporation." Section 2 (a) (1), *infra*, p. 13. The "individual" subject to the tax is the one having a net income. Section 210 (a), *infra*, p. 13. The only question is whether it is the ward's or the guardian's net income which is subject to the tax. It is submitted that it is the ward's net income which is being taxed, and that she is the taxpayer, and not the guardian.

A guardian has only the custody and management of the ward's property, and title to it is in the ward, and not in the guardian. *Lamar* v. *Micou*, 112 U. S. 452, 472. Payments of funds to the guardian vest title in the ward. *Spicer* v. *Smith*, 288 U. S. 430. An appointee of the court to manage, control and administer the estate of one who, under the law, is incapable of managing his affairs is not a taxpayer. *Linderman* v. *Commissioner*, 28 B. T. A. 113, now pending on appeal before the Circuit Court of Appeals for the Third Circuit. The committee of an incompetent occu-

pies the same status as a guardian. In *Liberman's Committee* v. *Commissioner*, 54 F. (2d) 527 (C. C. A. 2d), the court said (p. 529):

> There is no provision in the 1924 act making the committee of an incompetent the taxpayer. The incompetent remains the taxpayer, although the committee is obliged to make a return for him.

In *Freuler* v. *Helvering*, 291 U. S. 35, this Court said (p. 44):

> Either the minor or his guardian must make the return, but in either case it embraces all the income and is the minor's individual return, not that of the guardian or the trust.

But even assuming that the guardian is the taxpayer, it has not been shown that he was engaged in any business. Occupancy of a fiduciary position does not alone constitute a business. In *Ames* v. *Commissioner*, 49 F. (2d) 853 (C. C. A. 8th), the court said (p. 855):

> Activities of such a taxpayer as an executor, if carried on for the purpose of earning profits may become sufficient to constitute the doing of business, but the execution of his trust by the executor of an estate in the ordinary way of gathering in, administering upon, and distributing the assets should not be so construed. The mere receipt of dividends and the payment of contractual debts shown in this case are but the ordinary incidents of the execution of his trust by an executor. * * *

To the same effect are *Refling* v. *Burnet*, 47 F. (2d) 859 (C. C. A. 8th); *Buckwalter* v. *Commissioner*, 61 F. (2d) 571 (C. C. A. 6th). So far as disclosed by this record, it appears that the guardian was merely the passive recipient of income which he distributed to his ward in the exercise of his discretion. Such activity does not constitute the carrying on of a business.[2]

We are not concerned here with the situation of a guardian claiming, in his own return, a deduction for some expenditure incurred by him in connection with the earning of his commissions as a guardian, as, for instance, rent or clerical hire. Here, the expenditure was made by the guardian on behalf of the ward out of her own income, which

---

[2] The decisions of the United States Board of Tax Appeals and the rulings of the Bureau of Internal Revenue cited by the petitioner (Pet. Br. 11, 12) do not specifically hold that, where the administration of an estate or trust consists merely of the gathering in and the distribution of income, such administration constitutes the carrying on of a business. If they may so be read, they are in conflict with *Ames* v. *Commissioner*, *supra*, p. 7.

On page 13 of her brief, the petitioner cites a ruling of the Bureau of Internal Revenue to the effect that an attorney's fee paid by a guardian to secure his appointment to permit his receipt of income for the ward is an ordinary and necessary business expense deductible in the return filed for the ward. The Government has raised the question of deductibility of similar expenditures in the case of *Commissioner* v. *Linderman*, *supra*, which is now pending before the Circuit Court of Appeals for the Third Circuit.

income was not derived by the ward from the operation of any business.

The case of *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509, cited by the petitioner, is clearly distinguishable. In that case, a profit was realized by the estate of a deceased person on a sale made by a trustee of certain shares of capital stock, and the questions presented were whether such profit was constitutionally taxable, and, if so, whether the trustee was required to report the profit and pay the tax thereon. The first question was answered in the affirmative. As to the second question, the Court referred to Section 2 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756, which defines the net income of a "taxable person." Paragraph (b) of that section provides:

> (b) Income received by estates of deceased persons during the period of administration or settlement of the estate, * * * or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: * * *.
>
> * * * * *

Reference was also made by the Court to the Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, which provides:

> SEC. 1204. (1) * * *
>
> (c) * * * trustees, executors * * * and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals. * * *

The Court concluded (p. 517):

> Thus, it is the plainly expressed purpose of the act of Congress to treat such a trustee as we have here as a "taxable person" and for the purposes of the act to deal with the income received for others precisely as if the beneficiaries had received it in person.

The decision confirms the power of the taxing authorities to look to the trustee for the tax upon profits derived by the trust estate, and to that extent he is a "taxable person". The same power is given under the Revenue Act of 1924, the statute here involved, Sections 219 and 225, *infra*, pp. 14, 15. However, the term "taxable person" is not used in the latter Act. The term used is "taxpayer", and it is specifically defined. It includes a trust or estate, but not a trustee, executor or administrator. Nor does it include a guardian or a guardianship.

On the authority of *Commissioner* v. *Wurts-Dundas*, 54 F. (2d) 515 (C. C. A. 2d), the petitioner argues that the expense of bringing suit against the trustees of the deceased grandfather's estate to secure an immediate distribution of income, was an expense of the guardianship. In the *Wurts-Dundas* case, the court conceived a guardianship as a separate taxable entity. In this, it is submitted, the court erred. No such entity is recognized by the statute. No return is required of it, nor is it liable for any tax. The error arises from the attempted analogy with the status of a trust. A trustee acts for a trust, which the statute recognizes as the "taxpayer", and, therefore, as a taxable entity separate and distinct from either the trustee or the beneficiaries. A guardian acts for a ward, but it is the ward who is recognized as the "taxpayer" by the statute, rather than the guardian or the guardianship, since it is the ward who is the "individual" whose income is being taxed. The statute recognizes neither the trustee nor the guardian as the "taxpayer", though each is charged with the responsibility of filing a return. Sections 219 and 225, *infra*, pp. 14, 15. *Liberman's Committee* v. *Commissioner, supra; Freuler* v. *Helvering, supra.* The analogy must fall, since a guardianship is not recognized in the statute as a taxable entity.

But, assuming *arguendo* the identity of a trust and a guardianship for tax purposes, such conces-

sion would not be helpful to the petitioner, because, even in the case of a trust, it must be shown that the deductions claimed were incurred by the trust in the carrying on of a business. It has not been shown that the guardianship was engaged in any business.

No petition for a writ of certiorari was filed in the *Wurts-Dundas* case, because no conflict of decisions then existed.

CONCLUSION

Since neither the petitioner nor the guardian acting in her behalf was engaged in any business, the expenditure here involved may not be classified as a business expense. We therefore respectfully submit that the decision below is correct and should be affirmed.

J. CRAWFORD BIGGS,
Solicitor General.
ANGUS D. MACLEAN,
Assistant Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
JOHN G. REMEY,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.

NOVEMBER 1934.

APPENDIX

STATUTE INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 2. (a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(9) The term "taxpayer" means any person subject to a tax imposed by this Act. [U. S. C., Title 26, Section 1262.]

SEC. 200. When used in this title—

* * * * *

(b) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person. [U. S. C., Title 26, Section 931.]

SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1921, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 6 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 2 per centum, and upon the next $4,000 of such excess amount shall be 4 per centum. [U. S. C., Title 26, Section 951.]

SEC. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *. [U. S. C., Title 26, Section 955.]

SEC. 215. (a) In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses. [U. S. C., Title 26, Section 956.]

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on

the same basis as provided in section 212, * * *. [U. S. C., Title 26, Section 960.]

SEC. 225. (a) Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,500 or over, if married and living with husband or wife;

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income;

(4) Every estate or trust the net income of which for the taxable year is $1,000 or over;

(5) Every estate or trust the gross income of which for the taxable year is $5,000 or over, regardless of the amount of the net income; and

(6) Every estate or trust of which any beneficiary is a nonresident alien.

(b) Under such regulations as the Commissioner with the approval of the Secretary may prescribe a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be sufficient compliance with the above requirement. Such fiduciary shall make oath (1)

that he has sufficient knowledge of the affairs of the individual, estate or trust for which the return is made, to enable him to make the return, and (2) that the return is, to the best of his knowledge and belief, true and correct. Any fiduciary required to make a return under this Act shall be subject to all the provisions of this Act which apply to individuals. [U. S. C., Title 26, Section 966.]

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 95.—October Term, 1934.

Catherine Llewellyn Van Wart, by Roy Van Wart, Natural Tutor, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 29, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

The sole question for determination is whether an attorney's fee paid by the guardian for conducting litigation to secure income for his ward, was a business expense within Sec. 214 (a) (1), Revenue Act, 1924, and therefore deductible from the minor's gross income. The facts, as stated by the court below, were these—

"Catherine L. Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones, deceased. Dr. Roy M. Van Wart, Catherine's father, with whom she resided in Orleans Parish, Louisiana, after being confirmed by order of the district court for that Parish in accordance with the laws of Louisiana as her natural tutor or guardian, and after duly qualifying as such, demanded of the trustees under the will that they pay over to him the accrued income of the trust created in favor of his ward. The trustees, claiming among other things the right to keep possession of the accumulations of such income until Catherine should become of age, when they conceded she would be entitled to the corpus as well as all accumulated income, declined to comply with that demand. Thereupon suit was brought in the name of the minor, by her father as next friend, in the federal court for the district in West Virginia in which the testator was residing at the time of his death, against the trustees to compel distribution of the income involved in accordance with the guardian's previous demand. That suit finally was decided

SUPREME COURT OF THE UNITED STATES.

No. 95.—October Term, 1934.

Catherine Llewellyn Van Wart, by Roy Van Wart, Natural Tutor, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 29, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

The sole question for determination is whether an attorney's fee paid by the guardian for conducting litigation to secure income for his ward, was a business expense within Sec. 214 (a) (1), Revenue Act, 1924, and therefore deductible from the minor's gross income. The facts, as stated by the court below, were these—

"Catherine L. Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones, deceased. Dr. Roy M. Van Wart, Catherine's father, with whom she resided in Orleans Parish, Louisiana, after being confirmed by order of the district court for that Parish in accordance with the laws of Louisiana as her natural tutor or guardian, and after duly qualifying as such, demanded of the trustees under the will that they pay over to him the accrued income of the trust created in favor of his ward. The trustees, claiming among other things the right to keep possession of the accumulations of such income until Catherine should become of age, when they conceded she would be entitled to the corpus as well as all accumulated income, declined to comply with that demand. Thereupon suit was brought in the name of the minor, by her father as next friend, in the federal court for the district in West Virginia in which the testator was residing at the time of his death, against the trustees to compel distribution of the income involved in accordance with the guardian's previous demand. That suit finally was decided

in favor of the plaintiff, it being held that the guardian was entitled to receive from the trustees his ward's accumulated income and future income as it annually accrued. *Van Wart* v. *Jones*, 295 F. 287. Accordingly, in 1924 the trustees paid over to Dr. Van Wart as guardian the accumulated income of $160,000 and current income of $80,000; and Dr. Van Wart, acting as guardian and by authority of the court of his appointment, paid out of the funds so received by him a fee of $30,000 to the attorneys who brought the suit for their services in the litigation. In the income tax return for 1924, which was filed by the guardian on behalf of his ward, a deduction of the attorneys' fee was claimed."

Pertinent provisions of the Revenue Act of 1924 are in the margin.*

The Board of Tax Appeals held the attorney's fee was deductible as an ordinary and necessary expense in carrying on business. Sec. 214 (a) (1). The Commissioner claimed it was personal expense of the minor taxpayer, excluded from deduction by Sec. 215 (a) (1), and the court below upheld this view. It declined to follow *Commissioner* v. *Wurts-Dundas*, Circuit Court of Appeals, Second Circuit, 54 F. (2d) 515. Because of this conflict the cause is here.

We agree with the conclusion that the ward, not the guardian, was the taxpayer. The return was filed by him in her behalf; the taxable income was hers, not his. The attorney's fee arose

*Revenue Act of 1924, c. 234, 43 Stat. 253:

Sec. 2 (a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(9) The term "taxpayer" means any person subject to a tax imposed by this Act.

Sec. 214 (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . .

Sec. 215 (a) In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses.

Sec. 225 (a) Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife.

out of litigation conducted in the name of the ward. It was paid for her benefit out of her income.

In *Freuler* v. *Helvering*, 291 U. S. 35, 44, we said: "The whole of the minor's income received by his guardian is taxable to the minor irrespective of its accumulation in the guardian's hands, distribution to the minor or payment for his support or education. . . . Either the minor or his guardian must make the return, but in either case it embraces all the income and is the minor's individual return, not that of the guardian or the trust".

The ward was not engaged in any business. So far as appears the same thing is true of the guardian. See *Kornhauser* v. *United States*, 276 U. S. 135; *Commissioner* v. *Field*, 42 F. (2d) 820; *Hutchings* v. *Burnet*, 58 F. (2d) 514; *Walker* v. *Commissioner*, 63 F. (2d) 351; *Lindley* v. *Commissioner*, 63 F. (2d) 807. Moreover, guardianship is not recognized by the statute as a taxable entity.

The judgment under review must be affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.